STATE OF MICHIGAN

COURT OF APPEALS

J. KENNETH KELLEY, ANNABELL KELLEY, and ANN M. KELLEY, Plaintiffs-Appellees,	UNPUBLISHED February 11, 2010
v	No. 288718 Monroe Circuit Court
COLLEEN KELLEY ROOT and CHERYL KELLEY, Defendants-Appellants.	LC No. 07-023926-CH

Before: Sawyer, P.J., and Saad and Shapiro, JJ.

PER CURIAM.

Defendants appeal the trial court's October 22, 2008 judgment of partition regarding a disputed 40-acre parcel of land located in Ash Township within Monroe County, which was owned by the parties as tenants in common. We affirm.

Plaintiffs' August 8, 2007 complaint sought to partition the 40-acre parcel of property, described as:

> The East ¼ of the Southeast ¼ of Section 33, Town 5 South, Range 9 East, consisting of 40 acres, more or less, except therefrom a right-of way-easement of the southerly 1782 feet of the West 25 feet thereof[.]"

Plaintiff J. Kenneth Kelley averred that James A. Kelley, his father, devised two parcels of property and an easement over the disputed property to him in his will, described as:

> A. The North half of the South half of the west half of the Southwest quarter of said Section containing 20 acres of land, more or less; and
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> B. The North half of the West half of the East half of the Southeast quarter of said Section 33 containing 20 acres, more or less, together with a right or easement over the southerly 108 rods (1782 feet) of the westerly 25 feet of the East half of the East half of the Southeast quarter of said Section 33 with the right to grade and maintain a roadway over the same for the purpose of going to and from Newport Highway and the 20 acre parcel described in this Paragraph B.

Kenneth averred that James further granted Kenneth's brother, Bryce J. Kelley, a life estate in the disputed parcel, and granted Bryce's children, the residuary interest in the disputed parcel. Kenneth and his daughter, Ann M. Kelley, subsequently purchased the 1/4 interests of Bryce's sons after Bryce's death, leaving Kenneth and his wife, Annabell, Ann, and defendants each owning a 1/4 interest in fee simple in the disputed property.

"An action to partition land is equitable in nature. MCL 600.3301; *Henkel v Henkel*, 282 Mich 473, 478; 276 NW 522 (1937)." *In re Temple Marital Trust*, 278 Mich App 122, 141; 748 NW2d 265 (2008). "[E]quitable actions are reviewed de novo with the trial court's findings of fact reviewed for clear error, *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005)[.]" *Id.* at 142. Interpretation of a statute constitutes a question of law that is also reviewed de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004).

"All persons holding lands as joint tenants or as tenants in common may have those lands partitioned." MCL 600.3304. "[T]he right of a co-tenant to partition is absolute[.]" *Swan v Ispas*, 325 Mich 39, 44; 37 NW2d 704 (1949).

> Partition may be accomplished voluntarily by cotenants or by judicial action. Physical division of the jointly held property is the preferred method of partition. "Normally a physical division of the property confers upon each cotenant his respective fractional portion of the land." Where such a division results in inequalities in owners' shares, the court may award money payments to offset the difference. Although partition in kind is favored, the court may also order sale and division of the proceeds when it concludes that an equitable physical division cannot be achieved. [*Albro v Allen*, 434 Mich 271, 284; 454 NW2d 85 (1990) (citations omitted).]

We note that although plaintiffs moved for summary disposition under MCR 2.116(C)(9) and (C)(10), the parties and the trial court referred to and relied on materials that were outside of the pleadings. A motion under subsection 9 is confined to the pleadings alone. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 245-246; 590 NW2d 586 (1998); *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002). "[W]here, as here, the trial court considered material outside the pleadings, this Court will construe the motion as having been granted pursuant to MCR 2.116(C)(10)." *Hughes v Region VII Area Agency of Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007), citing *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). Thus, defendants' claims that summary disposition should not have been granted under MCR 2.116(C)(9) and that they should alternatively be allowed to amend their answer to include affirmative defenses are inapposite under the circumstances, and we treat this case as a motion granted under MCR 2.116(C)(10).

We review a trial court's decision to grant or deny summary disposition under MCR 2.116(C)(10) de novo. *Universal Underwriters Ins v Kneeland*, 464 Mich 491, 495-496; 628 NW2d 491 (2001). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). If no genuine issue of material fact exits, defendant is entitled to judgment as a matter of law. *Quinto*

v Cross & Peters Co, 451 Mich 358, 362-363; 547 NW2d 314 (1996). After plaintiffs supported their position with affidavits or documentary evidence, defendants must demonstrate with evidence that a genuine issue of disputed fact exists. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006); *Quinto*, 451 Mich at 362-363. The mere possibility that an assertion might be supported by evidence at trial is insufficient. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

At the August 1, 2008 hearing on plaintiffs' motion for summary disposition, defendants agreed on the record to plaintiffs' partition plan as set forth in the G. B. Warnke & Associates' survey. A waiver is "the intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citations omitted). "A party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal." *Grant v AAA Michigan/Wisconsin, Inc (On Remand)*, 272 Mich App 142, 148-149; 724 NW2d 498 (2006) (citations omitted). The record reflects that, at the hearing, plaintiffs informed the trial court that the parties agreed to the "east/west division with the Plaintiffs receiving the westerly portion, and the Defendants the easterly portion." Defendants informed the trial court that "we do agree with the east/west division at this time. The only issue remaining is the culvert." The trial court again questioned whether the only remaining issue was the culvert, and defendants' counsel responded, "Yes." The parties' arguments thereafter focused on the culvert, specifically reimbursement to defendants for having to construct a new culvert on the portion of the disputed parcel that defendants were to receive. At the end of the hearing, the trial court again indicated that "the issue of the partition is resolved, and that's gonna be, as Counsel pointed out, the east/west split. I know that was an issue for a long time here how that was gonna happen." Based on this record, we hold that defendants agreed to plaintiffs' proposal to partition the disputed parcel as set forth in the Warnke survey, giving plaintiffs the westerly portion containing the easement, and defendants the easterly portion, and defendants are thus prohibited from taking a contrary position on appeal. *Grant (On Remand)*, 272 Mich App at 148-149. Defendants' contention that the trial court failed to make findings of fact regarding whether partition was possible without causing great prejudice as required by the court rules is therefore meritless. Because the parties agreed to the proposed partition, the trial court was never prompted to determine whether the disputed property could be partitioned without causing great prejudice to one of the parties, MCR 3.401(A)(1), or the parties' interests in the property, MCR 3.402(A). The parties never disputed that they owned the property in fee simple as tenants in common, and they agreed to the proposed partition.

With respect to defendants' request for reimbursement in order to construct a culvert on the portion of the disputed property that defendants would receive under plaintiffs' proposed partition, pursuant to MCL 600.3336(1), the trial court "may adjudge that one party compensate another in such a way as to equalize the partition" where the trial court determines that partition cannot be made equally. The trial court may consider "the equities of the situation, such as the value of the use of the premises by a party or the benefits which a party has conferred upon the parties." MCL 600.3336(2).

The record reflects that the parties agreed that plaintiffs' proposed partition would result in plaintiffs' retaining the existing culvert, over which Kenneth's easement ran. Plaintiffs provided evidence that Kenneth was the owner of the easement and culvert areas, and that he built the culvert with his father. Defendants argued that the culvert and easement were used by

others, a new culvert would cost about $4,000, and the partition would leave defendants without a culvert for their property. The parties agreed that the easement area was excluded in the property tax bill assessment. The tax bill for Kenneth's separate landlocked 20-acre parcel showed that his property was taxed on the easement area. Kenneth averred and provided documentation that he arranged for the necessary maintenance and repair of the culvert, without financial contribution from defendants, including $2,970 in repairs in 2005. Defendants offered no evidence to refute this, but provided evidence that installing a new culvert on their portion of the disputed parcel would cost about $4,000. Defendants also argued that Monroe County paid to repair the culvert. However, in support of this assertion, defendants provided a petition that stated its purpose was "for Kenneth Kelly to replace *his* culvert under *his* driveway. It is deteriorating and has stopped the water in the ditch from flowing properly" (emphasis added). Further, defendants submitted an estimate and payment from the Monroe County Drain Commissioner for cleaning the entire Scrabble Hollow Drain for a total price of over $24,000. The trial court ultimately concluded that "Plaintiff paid for keeping the culvert . . . in repair. That it went with the easement that the—the Plaintiff had obtained relative to the landlocked parcel of property, and I do not see how it would be equitable to—I—I understand what the split does, but nevertheless no one paid for that, those—the expenses of keeping that culvert up, except for the Plaintiff," and thus, the trial court held that an order of reimbursement for constructing a new culvert was not necessary to effect an equitable partition.

We find that the trial court's findings of fact in this partition action were not clearly erroneous with respect to the culvert and reimbursement issue. *In re Temple Marital Trust*, 278 Mich App at 141-142. Defendants failed to establish that an issue of material fact remained with respect to the culvert dispute. *Quinto*, 451 Mich at 362-363. Whether Monroe County at one point paid to clean the Scrabble Hollow Drain did not negate the facts that Kenneth and his father built the culvert, that Kenneth previously paid to have the specific culvert maintained and repaired, and that he never received any compensation from defendants. Further, the petition submitted by defendants did not indicate that someone besides plaintiffs paid for the repair of the culvert. Rather, it was a petition for *Kenneth* to repair the culvert. There was no evidence that defendants ever contributed to the construction, maintenance, or repair of the culvert. Notably, MCL 600.3336(1) does not require that the trial court award compensation to equalize a partition. Use of the term "may" in MCL 600.3336(1) signifies a discretionary provision. *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008). Further, the trial court ruled that the partition was equal under the circumstances, i.e., considering that defendants never contributed to the maintenance or repair of the easement or existing culvert. The trial court properly considered the equities, including the benefits that Kenneth conferred in maintaining the culvert. MCL 600.3336(2). Upon de novo review of the record, we affirm the trial court's order of partition and refusal to provide for reimbursement for a new culvert.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Douglas B. Shapiro